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THE UNITY OF INTERNATIONAL LAW: AN EXERCISE IN METAPHORICAL THINKING

Introduction

The issues of how international law is designed as a normative order, what the relationships between its parts and the whole are, and how these relations impact on its authority belong to the classical points of debate in international legal scholarship and philosophy of international law. My task in this article is not to provide a complete inquiry into different theories and concepts of international law as a legal order (or disorder) or to subtilise the complexities of relations between international law and its parts, areas, or regimes. Instead, I aim at providing a sketch of three different, though interconnected, metaphorical ways of thinking about international law as a whole. By so doing, I am highlighting an angle in which investigation of the normative structure of international law promises to bear fruit.

Picking up appropriate metaphors for discovering the peculiarities of a normative structure of international law is a challenge of its own. Certainly, any metaphor presupposes a degree of simplification, over-generalisation, or exaggeration. Yet still, they can provide an illuminating account of international law by highlighting some of its features and putting them in a spotlight from an unusual perspective. This is so because it is in nature of metaphorical thinking to provide a simple explanation for complex phenomena such as international law. In the three following sections I attempt to draw an image of international law and its normative structure as a tree, as a starry sky, and as a galaxy, with each image giving a specific perspective on where the normative authority of international law is located and how it is distributed with respect to the parts and the whole. My main focus during this enterprise will be on how one can perceive international law as a whole through the relations between general international law, different areas of international law, and/or even its particular norms.

I. On Trunk and Branches: International Law as a Tree?

"Theories are always worldmaking. […] They constitute the reality they intend to describe by representing it and constructing it on the basis of their own presuppositions and

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theoretical tenets."[1] All the knowledge we have and use as "theoretical" is inevitably metaphorical; it is a result and a process of carrying over the meanings, features, symbols, from one thing to another.[2] International law, just as law in general, is no exception.[3] While building comprehensive pictures of international law, theorising its different parts, one inevitably uses, implicitly or explicitly, metaphorical thinking.

From a metaphorical perspective, there are many ways of perceiving the normative structure of international law. Some of these tend to adopt a holistic perspective and start from a presumption of unity. In this case, the normativity of international law is seen as evenly distributed all over its parts due to some underlying set of norms and principles. International law being perceived in such a way appears as a coherent and monolithic normative order. And indeed, one might say that international law by actively proliferating since 1980's adopted a structure similar to one of the domestic legal orders with the "trunk" of constitutional law and "branches" of particular fields of regulation.[4] As Bruno Simma puts it, one may observe "[…] a transposition of functional differentiations of governance from the national to the international plane; which means that international law today increasingly reflects the differentiation of branches of the law which are familiar to us from the domestic sphere".[5]

The word "branch," which in itself makes up a part of a tree metaphor, is widely used in international legal scholarship as a synonym for areas or fields of international law. In its Survey on International Law in 1971, the International Law Commission covered seventeen "various topics into which international law as a whole may be divided" in order to compare "the degree of codification achieved in different branches."[6] The list of these areas has changed since then; some new branches of international law have uncoupled from original branches (such as international law on human rights which used to be considered as a part

[1] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (New York: Oxford University Press, 2016), 16.

[2] In this article, I draw on classical works on the theory of metaphor, such as George Lakoff and Mark Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 2003); Andrew Ortony, *Metaphor and Thought*, 2nd ed. (Cambridge: Cambridge University Press, 1993); John R. Searle, *Construction of Social Reality* (New York: Free Press, 1995).

[3] Metaphor in law is mainly considered in connection to the persuasive use of legal language, but also as a tool for comprehension the law, its shaping as a meaningful world filled with familiar ideas and symbols. See: Michael Hanne and Robert Weisberg, *Narrative and Metaphor in the Law* (Cambridge: Cambridge University Press, 2018).

[4] The idea of representing law through organic metaphors traces back at least to Montesquieu. The historical school of law (Savigny, Puchta) has significantly improved it by implementing the comparison between law and language which both sprout from the spirit of the people and thus cannot be imposed or designed, only captured. This enabled a picture of law as a living organism whose development resembles the development of living things.

[5] Bruno Simma, "Universality of International Law from the Perspective of a Practitioner," *European Journal of International Law* 20, no. 2 (2009): 270.

[6] 'Survey of International Law: Working Paper Prepared by the Secretary-General' (International Law Commission 1971) UN Doc A/CN4/245 para 13.

of "international law relating to individuals"), some other branches have emerged (such as international energy law or international law of development). Yet the general approach remains unchanged, and the concept of a branch of international law is still in a broad use.

The idea of branches of law as referred to in domestic (mostly continental) jurisprudence has its roots in the codifications in France and Germany in the 19th century (and later in the rest of Europe), which put an end to the medieval legal pluralism with different legal orders coexisting at the same time on the same territory, overlapping and competing with each other.[7] As a consequence, the metaphor of a tree as representing the structure of a legal order is one of the most canonical ones. Law raises from a soil of relations between people, their practices and cultures, and unites them under one rule. As Marie-Claude Prémont argues,

> [...] the tree of law is described, explained, and perceived through the organisational principles which have the remarkable characteristics of being essentially metaphoric in nature. There are four organisational, structural sub-metaphors, which directly contribute to the elaboration of the great metaphor of the tree: law is in constant *evolution* or *adaptation*; it draws its content from precise *roots* or *sources*; it is *multiplied* and *differentiated* in branches; the legal norms are organised in a form of *hierarchical pyramid*.[8]

The idea of a tree metaphor is that the trunk of a legal order maintains and connects all the branches of law serving in such a way a common and unifying backbone for the whole normative system. Each branch of law belongs to a legal tree and cannot exist or develop separately. The same applies to the trunk: being deprived of branches it simply perishes. The tree metaphor, therefore, represents a legal order as an ontologically holistic entity, in which everything is interconnected and based on some stable and certain ground.

International law, also, is often seen from such a holistic perspective. Bruno Simma assumes that the debates around the fragmentation of international law – which he considers to be the process of its "branching" – have reached the point where there seems to be an agreement that different regimes in international law, however independent they are, "cannot, at least not completely, 'contract out' of, decouple themselves, from, the system of general international law."[9] Robert Jennings, while approaching the holistic vision of international law from a geographical, rather than normative perspective, also emphasises the links of

[7] See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, 2nd ed. (Cambridge: Harvard University Press, 1995).

[8] "[...] l'arbre du droit se décrit, s'explique et se comprend à partir de principes organisationnelles qui ont la remarquable caractéristique d'être de nature essentiellement métaphorique. Ces sous-métaphores organisationnelles, structurantes, qui contribuent directement à l'élaboration de la grande métaphore de l'arbre, sont au nombre de quatre: le droit est en constante *évolution* ou *adaptation*; il puise son contenu à *des racines* ou à *des sources* précises; il *se multiplie* et *se différencie* en branches; les normes juridiques s'organisent sous la forme d'une *pyramide hiérarchique*." Marie-Claude Prémont, *Tropismes de Droit: Logique Métaphorique et Logique Métonymique Du Langage Juridique* (Montréal: Liber, 2003), 26. Hereinafter, the translations from French are mine.

[9] Simma, "Universality of International Law," 275.

validity between the "branches" of regional sub-systems of international law and the "trunk" of general (or universal) international law: "universality does mean […] that such a regional international law, however variant, is a part of the system as a whole and not a separate system, and *it ultimately derives its validity from the system as a whole*."[10]

The diversification and "branching" of international law can thus be seen either *ratione materie* or *ratione loci*. In the first case it relates to the connection between general international law and legal regimes, or, more broadly, substantive areas of international law (such as international human rights law, international environmental law, international trade law, etc.). Here, general international law as being relevant to the legal order as a whole is opposed to "particular" international law regulating specific issues. In the second case, it relates to the issue of general international law being geographically universal as opposed to the regional sub-systems of international law, or simply regional norms of international law. For both cases, nevertheless, proliferation, diversification, "branching" of international law is perceived as no more than a natural process of its development.

The tree of law metaphor, therefore, reflects a presumption of systemic and even hierarchical nature of law. As Hans Kelsen famously claimed, "the legal order […] is therefore not a system of norms coordinated to each other, standing, so to speak, side by side on the same level, but a hierarchy of different levels of norms."[11] Indeed, when looking at a tree one can always trace each particular leaf's connection to the trunk through the chain of twigs, sub-branches, and branches.[12] Once a leaf or a branch gets detached from a tree, it stops being a part of a system and dies due to the lack of vivifying validity, just like a norm cannot exist outside a normative order.[13] Jörg Kammerhofer observes that "this hierarchy is the dependence of one norm upon another norm for its validity" and "since that dependence is one-sided, it makes sense to call the dependent norm a 'lower' norm and the norm it depends upon the 'higher' norm."[14]

Another necessary consequence of the tree of law metaphor is that it implies a functional separation between the trunk and branches. Even though they consist of the same (normative) "material," they nevertheless have distinct purposes and manifestations. The trunk is what connects the leaves and branches to the roots of social reality, and in this role, it acts as a growing point of law; no branch can start growing on its own, separately from the trunk. The trunk also maintains the unity of the legal tree; it does not let it fall apart. An interesting feature of a tree mainly related to the trunk is so-called secondary growth that

[10] Robert Jennings, "Universal International Law in a Multicultural World," in *Liber Amicorum for Lord Wilberforce*, ed. Maarten Bos and Ian Brownlie (New York: Clarendon Press, 1987), 41 (emphasis added).
[11] Hans Kelsen, *General Theory of Law and State*, trans. Andreas Wedberg (Cambridge: Harvard University Press, 1946), 124.
[12] Ibid, 115.
[13] Ibid, 113.
[14] Jörg Kammerhofer, *Uncertainty in International Law: A Kelsenian Perspective* (New York: Routledge, 2011), 108.

causes a tree's widening and thickening, as opposed to the primary growth which results in twigs and branches division and elongation. The function of secondary growth is to make a tree less subject to the winds, but also to make the trunk and branches stronger and able to carry more weight. A young tree is flexible and can easily bend; it makes it adaptive but physically weak, because of lack of the secondary growth.

Could it not be the case then that a functional separation between the trunk and branches, as well as the primary and the secondary growth which stands for their structural differences, resemble the idea of law having two distinct but interlaced sets of rules? One set is about regulating behavior – these are the twigs and leaves which constitute the most visible and, in fact, the most important for the every-day "users," parts of law; these rules appear as a result of the primary growth. And the second set is about making this primary growth less subject to the threats of the environment, addressing, so to speak, the inherent defects of primary growth: its excessive flexibility, inability to carry a big mass of norms, etc. Does not it somehow resemble a theory of primary and secondary rules as developed by Herbert Hart?[15] Basically, secondary rules in legal orders address similar structural issues as secondary growth in trees: they both provide for a more stable, thick, unified, and less vulnerable system.

What are the relations between the primary and secondary rules as parts of a legal tree? In his book, Herbert Hart on several occasions sounds as if the introduction of secondary rules to an existing normative order turns such normative order into law. The mere title of chapter V of Hart's *The Concept of Law* ("Law as a Unity of Primary and Secondary Rules") may be read to mean that for a normative order to count as law it must have secondary rules which are therefore the markers of transition from not-yet-law to law. Also, he writes, for example, that "the introduction of the remedy for each defect [of a social structure consisting only of primary rules] might, in itself, be considered *a step from pre-legal world into the legal world*."[16] Over and above this, he argues that legal system exists under two basic conditions: (1) when there is a general obedience by citizens and (2) when there is acceptance of secondary rules by officials.[17] Such dualism, he notes, "is merely a reflection of the composite character of a legal system as compared with *a decentralised pre-legal form of social structure which consists only of primary rules*."[18] These passages from *The Concept of Law* may open a door for seeing law as necessarily being constituted from both primary and secondary rules with the functional separation they imply;[19] however such an interpretation is not fully correct.

Such a reading of Hart entails that secondary rules act as the trunk that is becoming thicker due to the secondary growth: they provide for identification, creation, and application of

[15] Herbert L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Oxford University Press, 1994), ch. 5.
[16] Ibid, 94 (emphasis added).
[17] Ibid, 116.
[18] Ibid, 117 (emphasis added).
[19] In fact, such a reading of Hart is quite spread. For example, it lays at the roots of Dworkin's criticism of legal positivism. Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986); Ronald M. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

primary rules located in branches. Therefore, if there is no solid trunk of secondary rules, the branches and twigs of primary rules weaken, which jeopardises the unity of a legal order. And since in the last chapter of his book devoted to international law, Hart claims that "[…] international law not only lacks secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying "sources" of law and providing general criteria for the identification of its rules,"[20] this supposedly means that he denies that international law has a trunk which provides for a formal coherence and consistency. Such reconstruction of Hart is widely used in international legal scholarship and serves a common starting point for criticism of his ideas about international law.[21] Many international lawyers claim that Hart failed to recognise the unity of international law and insist instead that international law has both the branches of primary rules and the trunk of secondary rules. For example, Pierre-Marie Dupuy argues that "[…] international law constitutes a legal order in formal meaning *because* it is provided with a system of secondary rules, and, especially, secondary rules of creation."[22] Oriol Casanovas insists that "public international law is a legal system the unity of which derives, in the first place, from the structure maintained between the rules which make it up: primary rules and secondary rules."[23] Karel Wellens assumes that the union of primary and secondary rules "[…] has always been influential in the international legal order."[24] Thus, from the perspective of international legal scholarship, international law does constitute a legal system and resembles the same normative structure as one of the domestic legal orders.

Some might object that such a tree metaphor sees international law as much more solid, dense, and twisted than it really is. First of all, such a vision of international law distorts the historical picture of how this normative order developed. It was not a steady growth of "the trunk" of customary rules from "the soil" of international relations, but rather spontaneous

[20] Hart, *Concept of Law*, 214.

[21] See, for instance, Ian Brownlie, "The Reality and Efficacy of International Law," *British Yearbook of International Law* 52, no. 1 (1982): 1–8; Jeremy Waldron, "International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?" in *Reading H. L. A. Hart's the Concept of Law*, ed. Luís Duarte d'Almeida, James Edwards, and Andrea Dolcetti (New York: Hart Publishing, 2013), 209–24; Jean d'Aspremont, "Herbert Hart in Today's International Legal Scholarship," in *International Legal Positivism in a Post-Modern World*, ed. Jörg Kammerhofer and Jean d'Aspremont (Cambridge: Cambridge University Press, 2014), 114–50; Jason A. Beckett, "The Hartian Tradition in International Law," *Journal Jurisprudence* 1 (2008): 51–83; Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H. L. A. Hart," *European Journal of International Law* 21, no. 4 (2010): 967–95.

[22] "[…] le droit international constitue bien un ordre juridique au sens formel *parce qu'*il est doté d'un système de normes secondaires, et, notamment, de normes secondaires de production.' Pierre-Marie Dupuy, *L'Unité de L'Ordre Juridique International: Cours Général de Droit International Public*, vol. 9, Collected Courses of the Hague Academy of International Law (The Hague: Martinus Nijhoff Publishers, 2003), 119 (emphasis added).

[23] Oriol Casanovas, *Unity and Pluralism in Public International Law*, trans. Francis Barret (The Hague: Martinus Nijhoff Publishers, 2001), 249.

[24] Karel C. Wellens, "Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Tends," *Netherlands Yearbook of International Law* XXV (1994): 32.

flashes of normativity in different parts of the world, on distinct matters. Pierre-Marie Dupuy observes that unity and universality of international law is a recent development, and particular international legal orders had effectively developed before being federated into one general international legal order.[25] André de Hoogh also claims that today, "if a number of political entities within a region […] were to come to […] agreement that they would be bound by rules established by covenants or by practice recognised as law, such regional law would not of necessity need to rely for its validity on some overarching (global) legal system."[26] International law has not always been a unified legal order, and the same to a large degree also applies to many domestic legal orders. And indeed, the presumption of the existence of some general "trunk" of the international legal order may be disputed as long as regional subsystems of international law may in fact build on the criteria of validity that may not be accepted as general or universal, such as, for instance, Islamic law.[27]

These considerations inevitably raise the question of whether there actually is something in international law that acts as its "trunk"? As it seems, there can be two conditions regarding the functions of this part of a legal tree. First, the trunk should be "general" in a sense of its unifying and supporting function regarding the branches. Second, the trunk should be superior to the branches in terms of the normative hierarchy – the trunk is to perform the function of validation of the rest of norms. In such a way, a candidate being able to fulfil the functions of the trunk should be either overarching and wraparound, or hierarchically superior in relations with branches.

The first possible candidate is what is usually being referred to as "general international law," since it is opposed to particular conventions and legal regimes and exists as an overarching body of norms. General international law is universal,[28] in a sense that it is "recognized as a valid and applicable law in all countries, whatever their cultural, economic, socio-political, or religious histories and traditions."[29] This traces back to Kelsen who wrote that "the norms of general international law claim permanent validity without any norm limiting this claim."[30] In this sense, general international law may indeed look like the trunk of the tree of international law: it is overarching, i.e., no branch of international law can grow

[25] Dupuy, *L'Unité de L'Ordre Juridique International*, 86.
[26] André de Hoogh, "Regionalism and the Unity of International Law from a Positivist Perspective," in *Select Proceedings of the European Society of International Law*, ed. M. J. Aznar and M. E. Footer (Oxford: Hart Publishing, 2016), 57.
[27] Michele Lombardini, "The International Islamic Court of Justice: Towards an International Islamic Legal System," *Leiden Journal of International Law* 14, no. 3 (2001): 665–80. See also discussion on Sharia as a validating criterion of international law for Islamic countries in Mario Prost, *The Concept of Unity in Public International Law* (Oxford: Hart Publishing, 2012), 106–25.
[28] Lassa Oppenheim believed that the name of general international law "must be given to the body of such rules as are binding upon a great many States, including the leading Powers," and thus "general international law […] has a tendency to become universal international law." Lassa Oppenheim, *International Law: A Tretise*, 7th ed., vol. 1. Peace (London: Longmans, Green and Co, 1948), 4–5.
[29] Jennings, "Universal International Law," 41.
[30] Hans Kelsen, *Principles of International Law* (Clark: The Lawbook Exchange, 2003), 95.

"outside" of it; and it claims universal validity, i.e., it performs the function of validation of any other layer or group of norms.

However, general international law does not constitute a dense or clearly distinguishable set of norms, and, as the International Law Commission stressed, there is no well-articulated or uniform understanding of what this term might mean.[31] Even though it can be approached as constituting general customary law and general principles of law,[32] it is sometimes seen as a system of principles, rules, and standards,[33] or even as a combination of customary international law and "general multilateral treaties,"[34] sometimes referred to as *traités-lois* as opposed to *traités-contrats*. General international law can also be seen as an embodiment of the community interests as distinct from the individual States interests.[35] Overall, in regard to general international law, there is no consensus even on whether it consists of customary rules exclusively or may also include treaties and/or general principles of law.

Another problem regarding general international law as exercising the function of the trunk of the tree of international law is that not all its norms are secondary. Putting it generally, not all of its norms perform the function of validation of other norms of international law thus creating a hierarchical chain. Certainly, norms on treaty law-making, statehood, identification of customary international law, etc., do perform such a function. But many other norms constituting the body of general international law do not, and they may be ordinary, even though universally valid, primary rules (such as the prohibition of aggression, or the freedom of the high seas). Even if one accepts that the condition of the overarching character is fulfilled by general international law, it cannot be said the general international law generates the validation chain, as it only partly consists of secondary rules.

A crucial point with regard to the idea of the trunk as representing the body of secondary rules, is that in international law secondary rules do not function in a way which would allow to declare international law a legal system. The vein of reasoning behind the trunk approach is that in a legal order which is becoming more and more complex, with many overlapping or even conflicting regimes, there is on other way of perceiving and maintaining the unity of international law apart from looking at the existence of an invariable set of rules that are of structuring function, i.e., secondary rules. In this regard, the view of Mario Prost deserves full endorsement when he claims that

[31] "Report on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Finalized by Martti Koskenniemi" (International Law Commission 2006) UN Doc A/CN.4/L.682 para 493(3).
[32] Ibid, para 174, 194.
[33] Rüdiger Wolfrum, "General International Law (Principles, Rules, and Standards)," *Max Plank Encyclopedia on Public International Law*, April 17, 2018, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1408
[34] Grigori Tunkin, "Is General International Law Customary Law Only?" *European Journal of International Law* 4 (1993): 539–40.
[35] Alexander Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008), 58.

> the mere existence of secondary rules is not sufficient to prove the existence of a unitary and autonomous system of law. The effective existence and integrity of a system of law, Hart claims, rests on a certain relation or rapport to law. Hart insists, in particular, on the fact that secondary rules must be effectively "internalised" by the system's officials.[36]

In international law, there is no a unified system of officials, who are, according to Hart, the main addressees of the secondary rules.[37] In such a way, even if one assumes that the mere existence of the secondary rules is enough to claim that they as the structuring trunk of international law, it still remains unclear under what criterion this trunk of secondary rules can be thought of as got universally accepted by the officials.

Since the criterion of generality did not work, maybe the criterion of hierarchy might help? Thus, another candidate for being the trunk of international law are peremptory norms or the rules of *jus cogens*. A peremptory norm is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[38] Rules of *jus cogens* are of greater legal force than the rules of non-peremptory character, and therefore if a treaty conflicts with a peremptory norm at the time of its conclusion, such a treaty is void. However, does such a greater legal force of the peremptory norms necessarily create the relationships of validation between them and ordinary rules of international law? Even though peremptory norms are of a higher legal force regarding ordinary norms of customary international law or norms of treaties, they do not validate these ordinary norms. An ordinary norm of international law does not derive its validity from the body of peremptory norms, but it loses its validity if it contradicts a peremptory norm. In such a way, peremptory norms are not the sources of the validity of other norms, but rather opposite; they can be the source of their *in*validity.[39] In such a way, their superiority in legal force is a consequence of their substantive nature, rather than of their formal features.[40]

The same, although on different grounds, can be said about the "constitutional" character and therefore supreme legal force of the UN Charter. Art. 103 of the Charter, which states that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail,"[41] is often invoked as evidence of

[36] Prost, *Concept of Unity*, 87.
[37] On this point, see David Lefkowitz, "What Makes a Social Order Primitive? In Defense of Hart's Take on International Law," *Legal Theory* 23, no. 4 (2017): 258–82.
[38] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 53.
[39] de Hoogh, "Regionalism and the Unity," 63; Orakhelashvili, *Peremptory Norms*, 205–6.
[40] ILC, 'Reports of the International Law Commission on the second part of its 17th session and on its 18th session' (3–28 January 1966) UN Doc A/6309/Rev.l. Yearbook of the International Law Commission (1966, Vol. II), 248.
[41] Charter of the United Nations (adopted 24 October 1945), art 103.

its supreme legal force.[42] At the same time, it is also persuasively argued that this provision is merely a conflict clause rather than a hierarchy clause.[43] Even some of those scholars who argue in favour of treating the UN Charter as the world constitution admit that it may be a material constitution, rather than a formal one,[44] i.e., its rules do not have an *a priori* supreme legal force over the rest of international law, even though they may be seen as more important or essential.

Taken all together, there seems to be an argument that seeing international law as a tree with all the conceptual implications of this metaphor is not feasible. Such a view, even if being somewhat productive in explaining the domestic law, creates too many Procrustean beds for international law. Even admitting that general international law or peremptory norms perform a function of a trunk is not enough for a full employment of the tree-like vision of international law. Besides, lack of a formal normative hierarchy which would provide for both superiority and validation of norms leaves little room for the applicability of this metaphor.

II. On Stars and Constellations: International Law as a Starry Sky?

Seeing international law as a tree inevitably runs into many questions. This metaphor exaggerates the level of its structural consistency and contingency of different parts of the international legal order. It is quite doubtful whether international law has some sort of a "trunk" or whether its "branches" are clearly distinguishable. And even though there can be an element of hierarchy in international law, this hierarchy is rather situational and not formally predetermined by reference to source; it is dependent on the content and substantive character of a particular rule rather than on its formal features or source. The metaphor of a tree makes international law appear more as it should be rather than as it actually is.

As an opposition to the tree-like image of international law, it can be reasonably argued that in international law "each treaty is an island of its own and […] rules of customary international law may in certain ways be grouped together in a functional sense […] but with little attempt made to enhance the coherence between such fields."[45] In this regard, international law is merely an umbrella-notion used to overarch a multiplicity of international legal regimes created by states with no intention of having a coherent system of norms at the global scale. The horizontal nature of international law leads to a situation where "treaties

[42] Michael W. Doyle, "Dialectics of a Global Constitution: The Struggle over the UN Charter," *European Journal of International Relations* 18, no. 4 (2012): 601–24; Pierre-Marie Dupuy, "The Constitutional Dimension of the Charter of the United Nations Revisited," *Max Planck Yearbook of United Nations Law* 1, no. 1 (1997): 1–33; Bardo Fassbender, *The United Nations Charter as the Constitution of the International Community* (Leiden: Martinus Nijhoff Publishers, 2009).
[43] Andreas Paulus and Ruben Leiß, "Art. 103," in *The Charter of the United Nations. A Commentary*, ed. Bruno Simma et al., 3rd ed., II (New York: Oxford University Press, 2012), 2137.
[44] Nicolas Onuf, "The Constitution of International Society," *European Journal of International Law* 5, no. 1 (1994): 16–18.
[45] de Hoogh, "Regionalism and the Unity," 56.

and custom come about as a result of conflicting motives and objectives – they are 'bargains' and 'package-deals' and often result from spontaneous reactions to events in the environment."[46]

In such a view, international law looks more like a disorder, a scattering of norms in an ocean of lawlessness, and its different parts have little connection to each other or to something that acts as "trunk." An overwhelming majority of international treaties in the world are bilateral treaties, and only a small number of these have or can potentially have a universal effect.[47] Even customary international law that is supposed to have universal validity is claimed only to be effective and perform the regulative function for a small amount of states:

> customary international law can reflect genuine cooperation or coordination, though only between pairs of states or among small groups of states. Other times, customary international law may reflect self-interested state behavior that, through coercion, produces gains for one state and losses for another. Much of customary international law is simply coincidence of interest.[48]

In this regard, international law seemingly does not have a solid body of norms that act as a united and coherent legal front, but rather something amorphous, volatile, and sparse. Moreover, those sparks of normativity which supposedly constitute international law are results of political processes, but unlike in domestic setting, international law and international politics do not always have a clear separation line. Since international law is merely a set of dots of normativity, the borders of such dots are determined by the background of politics and morality. Such a claim, typical for critical approaches to international law, disputes the mere idea of international law having some borders since they are entirely dependent on political and moral arguments used in a "legal" way.[49] Critical legal studies in international law made it clear that in international law, traditional liberal doctrines based on the separation of law from politics and morality cannot work, and their project involved "[…] pointing at the openness, contradictions and structural biases hidden in […] doctrines, rules and interpretations, and extending realism to the point of seeing law as left to the unguided discretion of judges or other decision-makers, as 'politics'."[50] Hence, not only the

[46] Arnold Pronto and Michael Wood, eds., "Fragmentation of International Law," in *The International Law Commission 1999–2009*, Volume IV: Treaties, Final Draft Articles, and Other Materials (New York: Oxford University Press, 2010), 641.

[47] Prost shows that a purely quantitive analysis of contemporary international law gives quite illustrative numbers: 70 to 75% of the treaties in the world are bilateral treaties, and only 10% of international treaty law has a universal or potentially universal scope. Prost, *Concept of Unity*, 36.

[48] Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005), 225.

[49] See David Kennedy, *International Legal Structures* (Baden-Baden: Nomos, 1986); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006).

[50] Siegfried Wiessner, ed., *General Theory of International Law*, vol. 1, American Classics in International Law (Leiden: Brill Nijhoff, 2017), 57.

small dots of normativity are rare, but they also appear as continuations of, and shaped by, politics.[51] Different political powers employ their vision of international normativity and impose this vision on the whole unity of international law. Thus, one might recall "Western" and "Soviet" international law opposed not only as political programmes but also as visions of the very same legal order. Today, though, "the structure [of international law] provided by the East-West confrontation was replaced by a kaleidoscopic reality in which competing actors struggled to create competing normative systems,"[52] and this kaleidoscopic reality is conceptually opposed to the view that international law is a definable whole. As a result, "in today's interconnected world, the map of international law looks increasingly like a mosaic of disconnected pieces: shaped by many hands, interpreted by many voices, colored by numerous contexts, made up of a huge variety of materials."[53]

Since international law is an open, uncertain, almost transparent net pierced by international politics and morality, with no obvious structure, and its norms are rather rare dots against a much bigger background of lawlessness, would it not be reasonable to reject the tree metaphor for good and say that international law is just like a starry sky? Rare dots of stars are surrounded by dark emptiness, like a scattering of norms of international law here and there are obvolute by an unstable, shifting, elusive matter of international politics. In this perspective, international law is much more absent than it is present; in the night sky of the global order there are too few normative dots of stars and there is too much "emptiness" of politics.

An important feature of such a view of international law is that it is of a boldly state-centric, or, more broadly, subject-centric nature. For if one claims that international law's presence is confined to a set of rare dots of light against the dark background of the night sky, it implies a radicalisation of the Lotus principle: in the absence of clear prohibitions, a state must be assumed free.[54] In other words, the actual existence of international law is intrinsically limited by relatively high "pedigree test" concerning rules of customary international law, treaties, general principles of law, and other secondary sources. Apart from these shiny dots of proven-to-be-norms, there should be nothing to count as international law. In this regard, a relatively rare presence of stars in the night sky is a consequence of the dominance of emptiness in the universe. International law is quite like this; it consists only of what states

[51] This, however, should not be taken as an *a priori* bad or unwanted state of affairs. For instance, Jan Klabbers by emphasising the relevance of Hannah Arendt's ideas for international law, shows that a "pure" meaning of politics (akin to a "pure" meaning of law in Kelsenian manner) implies "a politics stripped of all attempts by individuals to promote their own interests." Such "pure" politics is fragile and therefore requires islands of normality shaped by promises. These islands, though, should not be many, as "an overdose of promises means that they lose their binding force." Jan Klabbers, "Possible Islands of Predictability: The Legal Thought of Hannah Arendt," *Leiden Journal of International Law* 20, no. 1 (2007): 5–9.

[52] Martti Koskenniemi and Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties," *Leiden Journal of International Law* 15, no. 3 (2002): 559.

[53] Kalypso Nicolaidis and Joyce L. Tong, "Diversity or CacophonyThe Continuing Debate over New Sources of International Law," *Michigan Journal of International Law* 24 (2004): 1350.

[54] *The Case of the S. S. "Lotus"* (*France* v. *Turkey*) (Judgment) 1927 PICJ Rep Series A No. 10.

agreed to consider as law, nothing more, nothing less. This implies that international law has a "punctiform" structure; its appearance is concentrated around particular issues rather than evenly spread all over the night sky of international relations.[55] For a curious observer who looks at the starry sky above, international law appears as a result of infrequent flashes of normativity. Such an observer might justly say that this sparseness of international law makes it very delicate and vulnerable.

The state-centric character of the starry-sky metaphor of international law also manifests itself in how states perceive international law. As an aftermath of a sparse nature of international law and the fact that most of the treaties and customary rules have a limited scope both *ratione personae* and *ratione loci*, "each state has a unique set of legal obligations as a consequence of its past statements and actions and it cannot be said that treaty commitments apply equally to all states."[56] Therefore, each state sees international law from its own perspective; in fact, international law looks differently for each and every state. People in different parts of the world cannot see the whole picture of a starry sky either; there can be no-one who is able to see all the stars at once. In this regard, international law is very difficult to grasp in one sight; one might need to employ quite sophisticated devices to make this possible, such as systemic integration.[57]

Apart from purely locational reasons, international law's image varies depending on cultural peculiarities. Anthea Roberts claims that "what counts as international law depends in part on how the actors concerned construct their understandings of the field and pass them on to the next generation,"[58] or, as Carlo Focarelli puts it, "international law does not exist 'in itself,' regardless of the knowers and their idiosyncrasies and interests."[59] Jean d'Aspremont even argues that "international legal scholarship has become a cluster of different scholarly communities, each using different criteria for the ascertainment of international legal rules."[60] In other words, not only states see different normative stars above, but they also tend to interpret them quite diversely. Moreover, such interpretations may depend on specific political situations, and thus states' adherence to and repudiation of international law is merely a function of their politics. States may apply a more holistic and universalistic vision of international law when it fits their goals, or they may ignore some critical connections between norms when this connection is unwanted. They may constantly switch from one interpretation of international law to another.[61]

[55] The idea of the punctiform structure of international law was first expressed be Paul Reuter. See Paul Reuter, *Organisations Européennes* (Paris: Presses universitaires de France, 1965), 216.
[56] Ian Hurd, "Three Models of the International Rule of Law," *Eidos* 23 (June 1, 2015): 43.
[57] For discussion, see Panos Merkouris, *Article 31(3)(C) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Leiden: Brill Nijhoff, 2015).
[58] Anthea Roberts, *Is International Law International?* (New York: Oxford University Press, 2017), 2.
[59] Carlo Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (Oxford: Oxford University Press, 2012), 90.
[60] Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford Monographs in International Law (Oxford: Oxford University Press, 2011), 3.
[61] Goldsmith and Posner, *The Limits of International Law*, 169.

In such a way, a systemic image of international law is in constant change and dependent on political motives. Since the normative structure of international law is determined purely by a perspective adopted by a particular state, it can also be claimed that sometimes the stars of international law are over-lighted by the light on the ground, by the light of the domestic law. When having a powerful source of light nearby, one can hardly see the stars; the light of domestic law can spoil the shining of the stars of international law, make them almost invisible. Sometimes this can be good: light on the ground is much more illuminating than a barely perceptible shine of the stars. In the same way, for instance, domestically implemented standards of human rights are much more effective than merely formal participation in an international human rights treaty. In this regard, the correlation between the stars above and the light on the ground creates a specific interlacing normative process, which "forces states to become more law-abiding by incorporating international law into their legal and political structures."[62] But sometimes this can also be bad: it is quite common that lawyers are reluctant in applying international law to domestic issues, even when such application is justified. Why would a lawyer try to find a solution to a problem by squinting to observe the faint light of the stars when she can simply bring it under a powerful lamp of domestic law? Would it not be a simpler solution for her just to take into account the light radiated by domestic bulbs – the kind of light she is most familiar and comfortable with?

Apart from being state-centric, the starry sky metaphor of international law may be quite illuminating in terms of how a seemingly disconnected set of norms of international law above is getting united into some structured order. While looking at the starry sky, people not only see stars but also constellations (if they know where to look). All the constellations we know do not reflect any actual connection between the stars. The groups of stars associated with some mythological figures or simple every-day objects just happened to be close enough for people to attach some meaningful concepts to them.

Could we say then that the constellations we see in the starry sky of international law are just like different legal regimes and fields of international law? There is the Big Dipper of international human rights law with a number of shiny conventional stars. And close to it, there is the Small Dipper of international humanitarian law – pay attention to the Fourth Geneva Convention, that's the Polaris. Some constellations have a clear bright leader of a particular star, say, UN Convention on the Law of the Sea is just like Sirius in the Canis Major of the international law of the sea. The Southern Cross, however, consists of the stars with almost no difference in brightness, like the stars in the constellation of international criminal law. Each norm of international law is inscribed into the system of a constellation, which appears to be like legal regimes and "branches" of international law.

What is important is that there is nothing in constellations beyond our imagination and social conventions about calling those seven stars above the equator the Orion and those four stars in the South the Southern Cross. What makes them appear as constellations is our perception alone. All these stars in which we see some figures do not have any actual

[62] Harold Hongju Koh, "Transnational Legal Process," *Nebraska Law Review* 75 (1996): 206–7.

relations; they fly through the space at an enormous distance from one another. Seeing international law in this manner largely relates to the idea that law as such constitutes a unity, a whole, a system, only due to our intellectual efforts of interpreting it in such a way. And such an approach also presumes that international law looks different depending on what interpretation of the supposed "branches" and "fields" is used. Just the same way as some cultures recognise a dipper in the seven stars shining in the North, whereas others a bear, a bucket, a carriage, even a coffin, a systemic image of international law also depends on the cultural, historical, gender, racial, etc., perspective.

From this follows that the dominant image of international law as imposed by the Western states is not the only one available, as it ignores the Third World states vision of international law;[63] or that the image of international law represents only a male's point of view on international law, which should at least be supplemented by a feminist perspective,[64] etc. In the same vein, the Islamic approach to international law on human rights is different from the European one; the Western view on international trade differs from the one of China and India; international environmental law in the First World looks unlike that in the Third World.

As a consequence, in a quite paradoxical way, a mosaic, sparse, disorganised, dependent on many perspectives picture of international law turns from being explicitly state-centric to being radically pluralistic. At some point it becomes obvious that international law as such does not have its own face or common appearance; each more or less representative group with a specific social identity may claim its rights for a particular image of international law and a picture of its normative constellations. In such a setting, when the starry sky of international law allows for multiple collaged, pluralised constructions and perceptions, a question may arise: where is the place for general international law? There are no constellations which are visible from all parts of the world; even the most universally recognised custom may, therefore, reflect only a particular parochial view on what international law is or should be. At the same time, a parochial view of a concept may be universalised through acceptance.[65] Would it not then be reasonable to say that general international law is represented by the constellations which are universally recognised, i.e., which do not depend on the cultural differences? Is this not the meaning of universality applied to general international law? In such a view, general international law is not merely a set of constellations comprised of the customary stars, but also a universally accepted convention according to which these constellations are recognised.

[63] Bhupinder Chimni, "Third World Approaches to International Law: A Manifesto," *International Community Law Review* 8, no. 1 (2006): 3–27.

[64] Hilary Charlesworth, Christine Chinkin, and Shelley Wright, "Feminist Approaches to International Law," *American Journal of International Law* 85, no. 4 (1991): 613–45.

[65] Joseph Raz provides an illuminating account on how the transition from parochial to universal happens by assuming that it is possible to have law without any concept of law or legal system. This leads him to a conclusion that the general theory of law is in principle available in the sense that it can be a result of a reduction of the concepts to the practices. See: Joseph Raz, "Can There Be a Theory of Law?" in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, ed. Martin P. Golding and William A. Edmundson (Oxford: Blackwell Publishing Ltd, 2008), 324–42.

The status of general international law is therefore also purely constructed and appears as a result of an additional layer of meaning. First, we construct a meaning of some group of normative stars which happened to be neighbours. Say, people discerned an outline of a dipper (or bear, or coffin) in seven stars in the Northern sky, just like lawyers put conventions and customary rules related to human rights under an umbrella-concept of international human rights law. Second, for this area of international law to become a part of general international law, such an umbrella-concept should be universalised, i.e., gain general acceptance. In other words, what makes general international law general is the existence of an additional layer of a constructed meaning attached to constellations in the sky already recognised by some states. Such an additional layer performs a coordination function and simplifies the communication between different perspectives of a particular area of international law. Not only states see some constellations in the starry sky, but they also agree on the fact that this sight is perceived universally and thus making it general. In such a way, international law can become general, but it is never general initially.

The metaphor of a starry sky can illuminate some peculiarities of international law which cannot be recognised from a perspective of the metaphor of a tree. However, where the tree-like approach to international law runs to the extremes of exaggerating its coherence and systemic unity, the starry sky-like approach runs to another extreme by making international law too elusive by blurring and washing out its picture. International law within such view is impossible to grasp; it turns out that there is no international law as such, only separate norms which are connected or disconnected depending on present-day conditions, political climate, cultural peculiarities, and professional background of a spectator. International law is thus left deconstructed with no instruction given of how it can be reconstructed. There is nothing to say about international law, only about what it might or might not seem to be. This leaves little room for the authority of international law. What kind of authority can there be if international law is merely a kaleidoscope or cacophony of competing interpretations and meanings, and their weight depends almost exclusively on political (ir)rationality and narrow actor-centred interpretative perspectives?

III. Looking for a Middle Ground: Stars, Planets, and Galaxies

International law is known for its lack of a harmonious and well-composed normative structure. Some suppose that this constitutes its biggest weakness, as it makes international law less effective and dispersed; whereas others assume that, in fact, it is a strength, as it makes international law more adaptive and pluralistic. But whoever is right, the fact is that all different conventions, rules of customary international law, decisions, resolutions, declarations and so forth exist in a common space determined by specific use of language and of the attitude international actors' towards these pieces of normativity. The mere ability to think of international law as of something separate enables its perception as a whole.[66]

[66] As Martti Koskenniemi puts it, the meaning of expressions – such as international law— "are like holes in a net. Each is empty in itself and has identity only through the strings which separate it from the neighbouring holes." Koskenniemi, *From Apology to Utopia*, 8–9.

The lack of a well-defined, slim, and harmonious tree-like structure, though, does not mean the lack of any structure whatsoever. International law does not know a formal hierarchy of norms, or at least not of the same type as in domestic law. Its institutional representation through decision-making bodies is uneven and discrete. Some norms of international law are supported through international organisations, whereas many exist on their own. All this makes international law quite irregular in its appearance and functioning. Some international legal instruments are more weighty than others in a sense that they attract commitments and endorsements, define the normative agenda of international community, and determine the development of international law. The European Convention on Human Rights, for instance, is a major point of gravity in the international law of human rights, and the practices, opinions, judgments around this Convention have an impact on areas of international law that do not directly fall under its scope. The UN Charter is a treaty that prevails over other treaties in a case of a conflict, and it established the system of the United Nations – the most representative international organisation ever existed – which makes it at least more important in a substantive meaning than probably any other treaty. The practices, opinions, and judgments formed within and around the Charter as a normative entity, including the jurisprudence of the International Court of Justice, also have their significant weight and gravity.

International law is horizontal – this is a well-known characteristic which primarily means that international law lacks a parliament, a government, and a hierarchical system of judiciary. At the same time being a decentralised normative order also means the existence of many different points of authority, none of which can be placed at the centre on the basis of some formal features. Treaties concluded under the aegis of the UN are of the same normative quality as treaties concluded between two states only. A judgment of the International Court of Justice does not have a stronger legal force than the judgments of any other international court or tribunal, even though only the ICJ is "the World Court." Yet, again, some pieces of international normativity become more important than others, some treaties form a new agenda for an international order, whereas others are "just treaties."

How to measure and explain all these nuances? Certainly, it is impossible to understand this within a traditional paradigm of validity, in which all the legal instruments in international law are of the same quality, and there is no way to say that one is higher than another.[67] But validity is not the only quality of law, and sometimes not even the most important one. In international law, a variety of legal instruments, customary rules, judgments, opinions, recommendations, etc., create their own gravitational fields. As Ronald Dworkin stressed, judicial practice, as well as any particular judicial decision, has its gravitational force, which means that judges, even when they disagree with previous judgments, should give them

[67] This is an approach commonly associated with the formalism in identification of the rules of international law. See, for instance, Jean d'Aspremont, "Softness in International Law: A Self-Serving Quest for New Legal Materials," *European Journal of International Law* 19, no. 5 (2008): 1075–93.

credit and consider them as having argumentative weight.[68] This argumentative weight indeed acts as gravity: a judge should provide more weighty and convincing arguments to overcome the influence of a previous judgment – just like a satellite should be sent into space at high speed to be able to break out from Earth's gravitational field. But of course, not only planets have gravity. Planets are often surrounded by moons or smaller pieces of matter. They themselves turn around stars, and stars are bound together by the gravity of a galaxy. All the pieces of normativity of international law have their gravity in a sense that they cause fluctuations of the matter by pulling decision-makers, states, and other actors, towards one or another point of normativity. The idea of normative gravity serves the purpose of emphasising the decentralised character of international law: since each piece of normativity has its gravity, gravity as such is never concentrated in one and only one location.

All these references to gravity may signal that we have not gone too far from describing international law as a starry sky. But the difference is that now we look at the stars of international law not through the eyes of a particular actor, say, a state, but through the eyes of a stand-aside observer who tries to unveil the relations between the stars as they are, and not how they may or may not appear from a particular perspective. This stand-aside observer, however, does not need to count himself as an "outsider," or if put it in Hart's words, as someone, who "may, without accepting the rules himself, assert that the group accepts the rules, and thus may from outside refer to the way in which they are concerned with them."[69] Her perspective does not necessarily mean any strict separation between "insiders" and "outsiders," i.e. those who observe international law from the inside and occupy an internal perspective (such as officials of states or international organisations), and those who try to observe it from a "nowhere" position looking at international law as if it is somewhere "there," detached and delineated as a separate phenomenon (like legal scholars or political philosophers).[70]

But how does the starry sky look like if we try to abandon a narrow subject-centered perspective and accept a view of this stand-aside observer? From Earth, all the stars indeed look like a mere scattering with no structure behind, and any systemic picture we may or may not have depends on our interpretation alone. Yet going beyond such perspective gives another picture. One might discover that stars are actually interconnected: they form quaint groups, merge into intertwined conglomerates and, if one takes an even broader picture, are consolidated into galaxies. Could it be the case then that international law and its normative structure is like a galaxy? Why not say that stars of norms of international law constitute a whole, a galaxy, but at the same time exist on their own? They can be smaller and bigger, lighter and heavier, duller and brighter, which fits perfectly into today's perception of

[68] Dworkin, *Taking Rights Seriously*, 111–23.
[69] Hart, *Concept of Law*, 89.
[70] Here, I share Pauline Westerman's criticism towards any strict separation of such kind of perspectives. Pauline Westerman, "The Impossibility of an Outsider's Perspective," in *The Objectivity in Law and Legal Reasoning*, ed. Husa Jaakko and Mark van Hoecke (Oxford: Hart Publishing, 2013), 45–66.

international normativity as a matter of degree,[71] a question of "more or less"[72] rather than of "yes or no."[73]

Is not it the middle ground between claiming that norms of international law are tied together like the parts of a tree and claiming that their relations are purely imaginary? The gravity of normative stars creates links between them. Stars close by influence each other; their overlapping gravitational fields makes them interdependent to a certain degree. Each star exists on its own, yet its trajectory largely depends on the stars around it. Many stars bound together by gravity may form conglomerates with no sharp borders. In the case of the galaxy of international law, one might call these groups of normative stars areas or fields of international law (like international human rights law, or international environmental law). And indeed, it might be more convincing to treat areas of international law in such a way rather than associate them with branches of a tree with a clear structure and high density, or with constellations that are only the products of our imagination. The groups of stars are uncertain, blurred, perplexed, and it may be unclear where one ends and another one begins. The same for norms of international law: it might be difficult sometimes to clearly separate one area from another, or to determine which norm from which area should apply.

The normative stars in the galaxy of international law may exist in different forms. It does not matter whether a norm appears as a treaty or customary rule, as a principle of international law or other normative standard, or even as a piece of soft law – all stars are different. But at the same time, there can be dissimilarities in how normative gravity appears depending on the form of its embodiment. The normative stars of treaties are the easy cases; their borders are usually sharp, coordinates certain, and their luminosity described in the handbooks. The norms of customary international law, however, can be harder to identify. Customary international law is less organised and more dispersed than the norms of treaties. Rather than resembling stand-alone stars, customary international law is like the galaxy's core – tightly packed group of stars, hot gas, and dust; it is the brightest part of our normative galaxy, it looks like a shining cloud around which the galaxy rotates. The body of general international law is often uncertain: it does not have sharp borders which separate it from the rest of the normative galaxy of international law, and its picture is blurred by dust and flashes of unformed stars of would-be customary rules. The codification of general international law allows one to clarify and set apart some parts of it by delineating a part of customary international law, and thus, international treaties that are results of codification of international law are the normative stars of the closest circle of the galaxy's core.

[71] See Richard R. Baxter, "International Law in 'Her Infinite Variety'," *International and Comparative Law Quarterly* 29, no. 4 (October 1980): 549–66; Christine Chinkin, "The Challenge of Soft Law: Development and Change in International Law," *International and Comparative Law Quarterly* 38, no. 4 (October 1989): 850–66.

[72] Koskenniemi, *From Apology to Utopia*, 393.

[73] See Pauline Westerman, "Validity: Reputation of Rules," in *Legal Validity and Soft Law*, ed. Pauline Westerman et al. (New York: Springer, 2018), 165–82.

General international law is the core of a normative order, which, however, loses its density from the centre to the edges. In this regard, general international law, constituted from norms of customary law mainly (or exclusively), is indeed omnipresent, but at the same time, its impact may vary depending on how far a star is from the galaxy's core. Therefore, general international law may be felt quite intensively near some areas of international law, whereas in some others its impact may be of a lower degree. Some distanced stars may experience little influence of the galactic core of general international law, thus being more independent and, to an extent, self-contained. This explains why some legal regimes formed around such distanced normative stars may not constantly rely on customary rules concerning responsibility, interpretation of treaties, etc.

The metaphor of a galaxy is also quite illustrative in terms of highlighting the relations between different normative stars. Each norm of international law may be taken and analysed on its own, but at the same time the closer the distance between them becomes, the more interaction it produces. It is the same with stars: the smaller the distance between stars gets, the more gravitational interactions arise. Stars may even compete with each other and experience each other's gravitational fields. These fields may overlap and an object unlucky enough to get in this overlap would be pulled in different directions – just like decision-makers in international law can be torn between two or more points of normative gravity that prescribe dissimilar or even contradictory standards of behaviour. This is exactly what the problem of fragmentation is all about: the more normative stars we get, the more gravitational conflicts we potentially face. In this regard, fragmentation may also have a positive side: because of fragmentation, the significance of international law has grown, and it regulates more and more fields which before were left solely to foreign policy or domestic jurisdiction.[74] The new normative stars of conventions, customary rules, soft law, etc., fill the void thus making international normativity more concentrated.

In this way, the structure of a galaxy is such that it is centralised but not hierarchical (the core of the galaxy consists of the same material as its edges – it is just much denser), holistic but with varying degree of density (a galaxy is one thing, but it consists of stars which are at huge distances from each other), interlaced but not solidified (stars impact on each other but are not bound). Normative stars constituting the elements of the galaxy of international law are also quite diverse: some of them are heavy and bright treaties, some others – small but luminous customary rules, or *vice versa*. The dullest stars of soft law may also become quite shiny, like, for instance, declarations. An advantage of such a galactic metaphor is that it acknowledges the different weight of norms in international law but does not impose a hierarchy on them. Some stars just happen to be bigger and heavier than the others; some norms just happen to be more weighty. The actual weight of a normative star is not a matter of its formal status (of a red giant or a white dwarf) but rather of the gravity it generates and

[74] Bruno Simma, "Fragmentation in a Positive Light," *Michigan Journal of International Law* 25 (2004): 845–8.

the impact it has on the decision-making, application, interpretation, and further development of international law.

The actual weight of a norm of international law does not exclusively depend on a particular threshold of validity or other formal characteristics. In contemporary international law, the norm-creation process is no longer restrained to the activity of states; it is a multidimensional and complex enterprise. In today's world, international organisations, NGOs, business corporations, and even private individuals can contribute in providing a norm of international law with a certain weight, and in this sense, we should indeed lift the states' veil and consider the individual impact on international law and *vice versa.*[75] In other words, it may not matter for the actual gravity of a norm of international law whether it is formally valid or not. Soft law can also have its normative gravity, even when it is not created by states, or only by states. The normative galaxy of international law is complex and even small and *prima facie* less relevant stars of declarations, recommendations, codes of conduct, etc., may have a gravitational impact on the massive stars of treaties and customary rules.

But even though norms of international law are like stars with differing weight, brightness, and gravity, different observers may pay more attention to some while ignoring others. Different decision-makers, like international courts, use distinct "telescopes" with filters that make them see only some specific stars. In this sense, when Art. 38 of the Statute of the International Court of Justice names international conventions, international customs, general principles of law, and judicial decisions and the teachings of the most highly qualified publicists as the types of applicable law,[76] it does not in fact cover all the possible types of normative gravity available in the galaxy of international law. Art. 38 of the Statute only lists those sources of normative gravity the ICJ should "see" and take into account, and in this regard it may indeed be argued that this article does not identify sources of international law, but rather acts as an applicable law clause.[77] This provision merely sifts out other points of normative gravity which are not visible through this specific lens. It does not mean, though, that when applying a different telescope or no telescope at all one would see the same picture of international law.[78] Rather she would see a much more diverse, complicated,

[75] Samantha Besson, "The Authority of International LawLifting the State Veil," *Sydney Law Review* 31 (2008): 343–80.

[76] Statute of the International Court of Justice (adopted 24 October 1945) art 38.

[77] Alain Pellet, "Article 38," in *The Statute of the International Court of Justice. A Commentary*, ed. Andreas Zimmerman, Christian Tomuschat, and Karin Oellers-Frahm (Oxford: Oxford Univeristy Press, 2002), 677–792.

[78] For instance, art. 21 of the Rome Statute of the International Criminal Court contains a different list of sources and places special emphasis on the priority of the Statute itself and of the Elements of Crimes and its Rules of Procedure and Evidence, as well as on relevant domestic law. The Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art. 21. Art. 293 of the United Nations Convention of the Law of the Sea specifically emphasise that the UN Tribunal on the Law of Sea shall apply only those rules of international law that are not incompatible with this convention. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, art. 293(1).

and splendid image of interlaced normative gravities that go far beyond the Statute's shortlist. The image of international legal normativity is much richer and more variegated.

Certainly, stars are not the only objects in a galaxy, just like the existence of a normative order is not confined to norms alone. Many stars have planets, moons, smaller satellites, asteroids, comets, and so on rotating around them. Norms of international law, also, may form a pool of decisions, opinions, procedures, practices, etc., around them – they are like asteroids trapped in the gravity of a normative star. Their language and purpose, application and formation are secondary in regard to the gravity of a norm, they rotate around this norm, and, to an extent, belong to it. These pieces of normative matter rotating around particular star of a norm may be bigger or smaller, more or less influential. Think of cornerstone judgments of the ICJ, or landmark judgments of the ECtHR, or noteworthy resolutions of the UN Security Council, etc.

Many more or less peculiar norms of international law have these satellites of subordinate normativity around. They may not necessarily enjoy legal normativity, as the threshold of what counts as law and what does not is quite flexible and shifting in case of international law. Sometimes moral or even political considerations and statements may fall into a gravity of a particular norm, thus creating a pool for a future legalisation. It is also worth noticing that not all norms have such a pool of subordinate normativity, just like not all stars have planets rotating around them. For this reason, not all fields of normative gravity in international law qualifies as a legal regime. There should be something else added to a norm for it to become the centre of such regime. This again is quite similar to how stars in a galaxy look like: they can simply be stand-alone things with only dust flying around, or they can form quite complicated system of planets, with each having the moons, etc. Are not these pieces of normativity bound together by the gravity of a normative star the decisions, practices, opinions, judgements, procedures "around which actors' expectations converge in a given area of international relations"?[79] Cannot we say that what is known as international legal regimes are just like these star systems with a central point of gravity in the form of a norm of international law represented by a treaty or custom and a complex system of heavier and lighter planets, moons, and asteroids of practices, procedures, opinions, judgments rotating in the orbits around it?

If star systems are like legal regimes in international law, then their normative gravity is strong enough to push out, at least partly, the gravity of a larger structure – like general international law. This implies a gravitational conflict between a star system and the galaxy. Bruno Simma and Dirk Pulkowski use a similar metaphor in this regard. In their view, the relations between general international law and legal regimes can be thought of as relations between "the law of the universe" and "the law of a planet." For them, the key feature of such a relation is that the picture of international legal order changes depending on what perspective lawyers adopt: "if we focus on the universe, the law of the universe (general

[79] Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organization* 36, no. 2 (Spring 1982): 186.

international law) governs the planets. If we focus on the planets, planetary rules (the rules of the subsystem) leave little room for universal law."[80] In this regard, Simma and Pulkowski are right to say that at the end of a day zooming in on a separate sub-system of international law is rather counterproductive as it leaves the general international law out of sight. The latter only becomes relevant when "lawyers reach out for the law of the universe of general international law to increase the effectiveness of the regime's rules."[81] In other words, if a spectator focuses on the normativity of a particular star of a legal regime, she always loses sight of the larger picture of the galaxy, and if instead she focuses on the galaxy as such, the normativity of particular regimes becomes too weak and insignificant.

But this is not *per se* what happens if we adopt a picture of the gravity presented here. Zooming in on a specific planet or star system does not exclude the galaxy of international law and its core of general international law. The more we zoom in, the less visible and perceptible the gravity of a larger structure becomes, but it never gets completely excluded. People on Earth basically feel only this planet's gravity, nothing else. We do not even perceive the gravity of our Moon (though some animals do), not to mention the gravity of the Sun or the entire galaxy. To some extent, the gravity of the closest normative object overshadows the other gravities. However, all these gravities are still present everywhere, they interlace and lie on each other and in principle can be measured with a high precision. In other words, zooming in on a particular normative star does not exclude the general gravity of international law. However far we are from the centre of the Milky Way, even a pocket radio can catch the wave of its core. Same happens in international law: however closed and self-contained regime is, the general international law and other closer points of gravity always seep through.

The perception of international law as a normative galaxy allows highlighting many crucial features of this normative order. It is much less dense than domestic law, and there is a big distance between the stars of norms of international law. Some segments of such galaxy are more plexiform, whereas its distanced areas may constitute merely stand-alone stars. Some star systems of legal regimes are well developed, whereas many normative stars have only dust of application practice around them. Some normative stars are heavy enough to become local centres of gravity, some others play merely supporting roles. Yet there is a mystery around galaxies akin to the mystery of the international legal order. Taken together, all the stars, planets, asteroids, and other objects in a galaxy do not have a mass which produces enough gravity to hold this galaxy together. In principle, galaxies should fall apart, but they do not. There is some invisible glue, which fills the gaps between the patches of matter and makes galaxies not fly asunder. In international law, also, there is a constant debate around the issue of what holds it together. There is something invisible, imperceptible, difficult to catch in the galaxy of international law (like in the actual galaxies), which does not let it fall apart. The astronomers poetically calls this thing "the dark matter," it is "dark" exactly because

[80] Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law," *European Journal of International Law* 17, no. 3 (2006): 506.
[81] Ibid, 510.

no-one can see it, but its existence is necessitated in all the calculations to make sense of the structure.

Can we not say the same about international law? In international law, also, there is a thing which is often presumed but no-one can observe or prove its existence, and this thing supposedly performs the very same function: it does not let the normative galaxy of international law fall apart. Cannot this be said about the *Grundnorm* of international law – a thing which nature is a matter of assumption?[82] Or, how far is it from truth to claim that those scholars who try to find at all costs the rule of recognition in international law are looking for the mysterious dark matter of a normative galaxy?

By trying to discover the "dark matter" of the galaxy of international law one may fall into a trap of imposing the image of domestic legal systems (which indeed look more or less like trees) to a legal order of a different nature. Yet it should not mean that there is no "dark matter" that helps to hold international law together. Perhaps finding it is just a matter of time and effort. The galaxy of international law is in the active stage of stars formation, with all these flashes of normativity here and there and with new regimes emerging all over the place. It might be difficult to see what kind of a dark matter holds them together, as these flashes outshadow its subtle fluctuations. It may turn out that the dark matter of our galaxy is not the rule of recognition and not even the *Grundnorm*, but something else, like human rights, or sustainability?[83]

By seeing international law as resembling the structure of a galaxy, one can undercover probably the most comprehensive metaphorical way of perceiving its authority. It is not and cannot be located in one particular point. Each and every normative piece has its weight and gravity, and taken all together their gravity converges. The relations of normative conflicts and determination of valid rules, the issues of relative normativity and hierarchy all fall under a simple model of gravity which makes decision-making allocated in a particular place between specific normative stars. This signifies a shift from validity-oriented questions (such as what counts as a norm of international law, or what the formal criteria of the normative hierarchy in international law are, etc.) to the authority-oriented questions (such as what the actual weight of norms of international law is, how this weight can be conceptualised and measured, how does it help in explaining a variegated picture of contemporary international law, etc.).

[82] As Kammerhofer puts it, the *Grundnorm* is not just a matter of assumption, but of an inevitable assumption. Kammerhofer, *Uncertainty in International Law*, ch. 7.

[83] The attempts of seeing the human rights and sustainability through the concept of the *Grundnorm* are quite illustrative in the light of metaphor developed here. Remarkably, when these two concepts are claimed to be the *Grundnorm* of international law, it is not their formal function of validation that gets emphasised, but their importance and weight. See, for example, Rakhyun E. Kim and Klaus Bosselman, "Operationalizing Sustainable Development: Ecological Integrity as a Grundnorm of International Law," *Review of European, Comparative International Environmental Law* 24, no. 2 (2015): 194–208; François Rigaux, "Hans Kelsen on International Law," *European Journal of International Law* 9, no. 2 (1998): 325–43. This, in fact, proves the opposite: human rights, sustainability, just like the rule of law, or justice, cannot count as the *Grundnorm* of international law, as they simply do not perform its function.

Conclusions

International law has many faces, and its picture is always complex and many-sided. This results in a multiplicity of ways one can imagine international law: as a tree, as a starry sky, as a galaxy, etc. Each metaphorical way of seeing international law spotlights some of its features and shadows others, yet still some metaphors are more accurate, more comprehensive, and more feasible.

We have seen that imagining international law as a tree is based on a presumption of its continuous and omnipresent existence. The tree of international law creates a normative shadow in which states and other actors hide from a devastating sunburn of possible international anarchy. For this shadow to be good, the tree must be strong, flattened, with a massive trunk and many branches. From this perspective, the process of branching of international law is actually a good thing. The authority of international law perceived as a tree is centralised and dependent on how strong and branchy this tree is; no branch can exist separately, and therefore each branch's authority is merely a function of the authority of the whole tree. Seeing international law as a tree, however, runs into many objections. Norms of international law may know some normative hierarchy, but they do not resemble such a clear and obvious subordination of one part of a normative order to another as one can observe in domestic legal systems.

Another way of making sense out of a decentralised normative order such as international law is to look at it as at a starry sky with dots of light against the dark background of lawlessness. In this perspective, international law's part-whole relations depend explicitly on interpretations and a multiplicity of ways of seeing this starry sky. Each state has its own picture of this sky, and it is quite challenging to come up with a comprehensive picture. This picture always remains fragmented and small-scaled. The allocation of authority in such circumstances becomes a rather senseless enterprise, as it has no real normative foundation.

Finally, international law may be seen from a perspective of the force of gravity. Each normative element in international law has its weight, relevance, importance, and all the multiplicity of these elements creates a structure akin to a galaxy. Stars of norms of international law pull decisions, judgments, practices, and opinions towards them, thus creating star systems. In this view, the authority of international law is just like gravity: it is everywhere, weaker or stronger, more or less perceptible. General international law in this regard performs the function akin to the function of the galaxy core: it is the bright central point, which gradually loses its density closer to the edges of this normative order.

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Kostiantyn Gorobets. The Unity of International Law: An Exercise in Metaphorical Thinking

Abstract. The article investigates three different metaphorical ways of thinking about international law. It begins with assessing whether the canonical metaphor of law as a tree can apply to international law, and how this metaphor relates to the concepts of validity and division between primary and secondary rules. Further, the article tests another metaphor, that of a starry sky, which assumes that international law represents a no-system, a skittering of norms that have no or little connection to each other. Finally, the article draws on the last metaphor of international law as a galaxy with norms of international law having different weight and gravitational pull. These metaphors allow to see the normative structure of international law under different angles, which makes such phenomena as general international law, *jus cogens*, global constitutionalism, etc., look differently depending on the image of international law being adopted.

Keywords: international law; normative structure; validity; authority; legal system.

Костянтин Горобець. Цілісність міжнародного права: вправи з метафоричного мислення

Анотація. Статтю присвячено спробам метафоричного осмислення міжнародного права. Одним із ключових аргументів на користь використання метафор є те, що різні візуальні образи, використовувані для осмислення міжнародного права, зумовлюють відмінності в тому, яке значення надається таким ключовим поняттям, як чинність, нормативність та авторитетність міжнародного права. Стаття починається з характеристики класичної метафори права як дерева, в якому кожна «гілка» постає як окрема галузь права і всі галузі з'єднані за рахунок «стовбура», яким у контексті національних правових систем часто зображується конституційне право. Така метафора, хоча застосовна до національних правових систем, не повною мірою пасує міжнародному праву, в якому відсутні правові елементи, які могли б повноцінно виконувати функцію «стовбура». Протилежна за своїм посилом метафора зображує міжнародне право як зоряне небо, в якому норми міжнародного права є розкиданими зірками на тлі політичної «темряви». Будь-яка нормативна структурованість за такого бачення є лише наслідком накладення смислів, подібного до того, як люди бачать сузір'я у групах нічим не пов'язаних зірок. Така метафора часто використовується в рамках деконструктивістської критики міжнародного права, однак є малопродуктивною з точки зору пояснення його нормативної системи. Остання метафора, продовжуючи космологічну тематику, пропонує сприймати міжнародне право як галактику, в якій кожен об'єкт має автономне гравітаційне поле. Що більш вагомим є такий об'єкт, тим сильніше він впливає на довколишнє середовище. Таким чином, різні гравітаційні поля створюють складну систему взаємозалежностей між різними нормами міжнародного права. Дослід з метафоричного осмислення міжнародного права дозволяє по-різному оцінити нормативні зв'язки, що існують між відмінними режимами у міжнародному праві й демонструють, що завжди є більше ніж один спосіб системного представлення міжнародного права.

Ключові слова: міжнародне право; нормативна структура; чинність; авторитетність; правова система.

Константин Горобец. Целостность международного права: упражнение в метафоричном мышлении

Аннотация. Статья посвящена трем различным метафорическим способам осмысления международного права. Статья открывается оценкой того, можно ли применить каноничную

метафору права как дерева к международному праву и как эта метафора связана с понятием действительности и разделения между первичными и вторичными правилами. Далее статья тестирует иную метафору, а именно звездного неба, которая предполагает, что международное право является не-системой, россыпью норм, которые слабо или никак друг с другом не связаны. Наконец, статья предлагает последнюю метафору международного права как галактики, где нормы международного права имеют различный вес и гравитационное притяжение. Эти метафоры позволяют увидеть нормативную структуру международного права под различными углами, что делает такие феномены, как общее международное право, *jus cogens*, глобальный конституционализм и т. д., зависимыми от того, какой именно метафоричный образ международного права используется.

Ключевые слова: международное право; нормативная структура; действительность; авторитетность; правовая система.

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